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Opinion following rehearing

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COURT OF APEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

EDWARD W. WEDBUSH et al., Plaintiffs and Appellants, v. PACIFIC BELL TELEPHONE COMPANY et al., Defendants and Respondents.	D045571 (Super. Ct. No. GIC797475)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Reversed in part; affirmed in part.

The trial court in this case found a telephone company had a prescriptive easement over the plaintiffs' land. The trial court also found an electric utility company, which had been granted an easement over the plaintiffs' land, had not unlawfully expanded its easement when it permitted the telephone company to place telephone lines on its poles. We disagree in part and accordingly reverse in part. In particular, we find the telephone

company did not establish the existence of a prescriptive easement. However, in permitting the telephone company to use its poles, the electric company did not unlawfully expand its easement.

SUMMARY

In 1958 defendant and respondent Pacific Bell Telephone Company (Pacific Bell) entered onto two adjoining parcels of land in Rancho Santa Fe and put telephone lines on electrical poles owned by defendant and respondent San Diego Gas & Electric Company (SDG&E). The owner of the parcels had granted SDG&E an easement for electrical poles and electrical lines. Although SDG&E's easement is set forth in a grant deed which was recorded, there is no record of any easement being granted to Pacific Bell.[1]

Pacific Bell placed its lines on SDG&E's poles under the terms of a 1914 Joint Pole Agreement under which each utility allowed the other utility to use its poles. However, the Joint Pole Agreement states in pertinent part that where poles are located on private property under the grant of an easement, "neither of the parties hereto grants or guarantees to the other the right to use such poles . . . as against the owners of the fee of such land."

All of Pacific Bell's lines were approximately 15 to 20 feet below SDG&E's lines. In 1969 and 1980 Pacific Bell added additional facilities on the two parcels.

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1 Pacific Bell's database contained a number of recorded and unrecorded easements on land surrounding the two parcels which are the subject of this appeal. However, Pacific Bell concedes it cannot establish that a similar easement over the subject parcels was ever granted to it.

In 1981 plaintiffs and appellants Edward W. Wedbush and Jean L. Webush bought the smaller of the two parcels, a four-acre tract of land.

In 1989, 1990 and 1999 Pacific Bell made still further additions to its lines across the two parcels. The 1990 work included installation of six telephone polls. Until the early 1990's, Pacific Bell's facilities were partially obscured by an orange orchard.

Pacific Bell presented evidence that its work on its lines over the two parcels required the presence of vehicles, some between 30 and 50 feet long, as well as equipment and employees. Pacific Bell also presented evidence its vehicles were prominently marked with its name and that while working on the lines its employees were required to wear hard hats which bore its company logo. Edward Wedbush conceded he had observed the telephone pole installation, but believed the work was performed by SDG&E.

In 2000 the Wedbushes bought the second and larger of the two parcels, a 28-acre tract of land. Prior to purchasing the parcel, Edward Wedbush contacted Pacific Bell about undergrounding its lines. A Pacific Bell official advised him that Pacific Bell would underground its lines but only if a property owner agreed to pay the cost of doing so.

In 2001 the Wedbushes sent Pacific Bell a demand that Pacific Bell underground its lines. Pacific Bell declined the demand.

The Wedbushes filed a complaint against Pacific Bell in October 2002. They added SDG&E as defendant in April 2003. In their third and final amended complaint

the Wedbushes alleged causes of action for declaratory relief, injunctive relief, trespass, nuisance and inverse condemnation.

The case was tried to the court. In its statement of decision the trial court found Pacific Bell had established a prescriptive easement over the Wedbushes' land and the Wedbushes' causes of action for trespass, nuisance and inverse condemnation were time barred. The trial court further found SDG&E had not forfeited its express easement and the Wedbushes' claims for affirmative relief from SDG&E were also time barred. Judgment was entered in favor of Pacific Bell and SDG&E and the Wedbushes filed a timely notice of appeal.

DISCUSSION

I

Standard of Review

We review the trial court's determinations of law de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.) "We review the trial court's factual findings for substantial evidence. Where findings of fact are challenged on a civil appeal, we are bound by the principle that 'the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. [Citation.]" (*Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1127.)

II

The Existence of a Prescriptive Easement

"[A]n essential element necessary to the establishment of a prescriptive easement is visible, open and notorious use sufficient to impart actual or constructive notice of the use to the owner of the servient tenement." (*Connolly v. McDermott* (1984) 162 Cal.App.3d 973, 977.) "The purpose of the requirement that the use be open or notorious is to give the owner of the servient estate ample opportunity to protect against the establishment of prescriptive rights. To satisfy this requirement, the adverse use must be made in such a way that a reasonably diligent owner would learn of its existence, nature, and extent. 'Open' generally means that the use is not made in secret or stealthily. It may also mean that it is visible or apparent. 'Notorious' generally means that the use is actually known to the owner, or is widely known in the neighborhood. Although the terms are often stated conjunctively, the requirements are disjunctive. A use that is actually known to the owner of the servient estate satisfies the requirement even though it is not open. An openly visible and apparent use satisfies the requirement even if the neighbors have no actual knowledge of it. A use that is not open but is so widely known in the community that the owner should be aware of it also satisfies the requirement." (Rest.3d Property, Servitudes, § 2.17, com. h. pp. 276-278.)

With respect to this element, the trial court made the following finding: "The Court finds that there was nothing clandestine about Pacific Bell's occupation. From 1958 to present, Pacific Bell installed and maintained its lines and poles on the Property. The facilities were visible and gave actual or constructive notice to the property owners.

While the Court accepts the plaintiffs' testimony, and their predecessors, that they did not know the facilities belonged to Pacific Bell, plaintiffs saw the facilities prior to the purchase of each of their parcels, and were aware of the facilities for the more than 20 years they lived on the Property. Thus, the Court concludes that Pacific Bell's use of the Property was open and notorious."

On appeal the Wedbushes argue that unless they knew or had reason to know the facilities were owned by Pacific Bell as opposed to SDG&E, Pacific Bell's use of the land was not open and notorious. We agree with the Wedbushes. We accept the Wedbushes's general premise that Pacific Bell's use of the land had to be such that a reasonable owner would have noticed Pacific Bell's use was different from and in addition to SDG&E's. (See *Boston Seaman's Friend Soc. v. Rifkin Mgmt.* (Mass.App. 1985) 473 N.E.2d 702, 704-705.) In *Boston Seaman's Friend Soc.* the occupants of two commercial buildings had for years shared the land between the buildings as a parking lot for the use of their respective employees and guests. They made no effort to determine the location of the boundary between their respective lots or identify which part of the parking lot was being used by which employees and guests. Under these circumstances, where there was nothing to distinguish either owner's use of the parking lot, the court found no prescriptive right to either owner's land could arise.

We agree with Pacific Bell that it was not required to show its use of the Wedbushes' land was *exclusive* of SDG&E's use of its easement. (See *Marangi v. Domenici* (1958) 161 Cal.App.2d 552, 556.) Nonetheless, where, as here, a utility's use of land is in close physical proximity to the use of another utility which has been granted

an easement, and the two uses are somewhat similar, showing open and notorious use requires some proof that the two uses were distinct enough to give the landowner notice that his land was being used by more than the utility which had the granted easement.

Thus here the question is whether the record is sufficient to show Pacific Bell's use of the land was distinct enough from SDG&E's use to give a reasonable person notice that Pacific Bell was acquiring the right to use the land. Our review of the record discloses three categories of evidence which distinguished Pacific Bell's use from that of SDG&E's. First, the telephone company's wires were strung 15 to 20 feet below SDG&E's and were considerably thicker than SDG&E's; secondly, in 1990 Pacific Bell installed its own poles on the property; finally when, during the more than 40 years its wires have been strung across the parcels, Pacific Bell made improvements to lines or performed routine maintenance using vehicles clearly marked with its logo and employed workers with the same logo on their hard hats.

As the Wedbushes point out, it is difficult to conclude Pacific Bell's intermittent entry on the property and installation of its wires were sufficient to put a reasonable person on notice that Pacific Bell had lines on the property. The difficulty stems in large measure from the trial court's own finding that neither the Wedbushes nor their predecessors in interest knew Pacific Bell's lines were strung across the property. While Pacific Bell was not required to prove that either the Wedbushes or any of their predecessors in interest had *actual* knowledge of Pacific Bell's use of the land, the failure of the owners to notice Pacific Bell's use of their property is a fact which must be considered in determining whether Pacific Bell met its burden. In this regard it is

important to digress slightly and once again set forth our role in reviewing factual determinations made in the trial court. "Trial court findings must be supported by substantial evidence on the record *taken as a whole*. Substantial evidence is not any evidence -- it must be reasonable in nature, credible, and of solid value." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51, italics added.) "Unlike the former practice, reviewing courts will now, in determining the existence of substantial evidence, *look to the entire record of the appeal*, and *will not* limit their appraisal 'to isolated bits of evidence selected by the respondent.'" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.)

Thus, in reviewing the whole record, the fact that none of the owners noticed Pacific Bell's use of the property is of some significance in determining whether a reasonable owner would have nonetheless noticed the telephone company's equipment. In this context Pacific Bell was required to produce evidence which was definitive enough to show that in failing to notice its lines and poles, the Wedbushes and their predecessors did not act with reasonable diligence.

The evidence produced by Pacific Bell did not meet this burden. In this regard we note there is no evidence Pacific Bell placed signs or other markers on its lines and poles which would have given property owners any continuing notice that they belonged to Pacific Bell. Thus in the end Pacific Bell must rely on the physical difference between its thick wires and the higher, thinner SDG&E power lines and its intermittent entry on the land to show that its use of the land was open and notorious. In our view the physical differences between the lines and Pacific Bell's separate entries are not sufficient because

drawing the conclusion that Pacific Bell was also using the property would require a degree of investigation on the part of the successive landowners which the law does not require. The intermittent entries are not sufficient because they would similarly require a level of vigilance which is not required of landowners.

In sum then we reverse the judgment in favor of Pacific Bell.

III

Issues Related to the Existence of a Prescriptive Easement

For the guidance of the parties and the trial court we discuss related issues the Wedbushes have raised on appeal.

A

In addition to showing that its use was open and notorious, the claimant to a prescriptive easement must also show that its use was under a claim of right. "Claim of right does not require a belief or claim that the use is legally justified. [Citation.] It simply means that the property was used without permission of the owner of the land. [Citation.] As the American Law of Property states in the context of adverse possession: 'In most of the cases asserting [the requirement of a claim of right], it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor.' (3 Casner, American Law of Property (1952) Title by Adverse Possession, § 5.4, p. 776.) One text proposes that because the phrase ' "claim of right" ' has caused so much trouble by suggesting the need for an intent or state of mind, it would be better if the phrase and the notions it has

spawned were forgotten. (Cunningham et al., The Law of Property (Law. ed. 1984) Adverse Possession, § 11.7, p. 762.)" (*Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 450.)

The law is fairly well settled that where a claimant shows it has used an easement for a substantial period of time without objection or interference from the landowner and there is no evidence the claimant ever sought permission from the landowner, the claimant has met its burden of showing that it was doing so under a claim of right. Some cases have spoken in terms of long use and the absence of permission as providing a presumption that the use was hostile. "The issue as to which party has the burden of proving adverse or permissive use has been the subject of much debate. However, [we agree with the view, supported by numerous authorities,] that continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence and in the absence of evidence of mere permissive use it will be sufficient to sustain a judgment." (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 571-572.) Other cases suggest that long use without objection provides no more than an inference that the use was hostile. "There has been considerable confusion in the cases involving the acquisition of easements by prescription, concerning the presence or absence of a presumption that the use is under a claim of right adverse to the owner of the servient tenement, and of which he has constructive notice, upon the showing of an open, continuous, notorious and peaceable use for the prescriptive period. Some cases hold that from that showing a presumption arises that the use is under a claim of right adverse to the owner. [Citations.] It has been intimated that the presumption

does not arise when the easement is over unenclosed and unimproved land. [Citation.] Other cases hold that there must be specific direct evidence of an adverse claim of right, and in its absence, a presumption of permissive use is indulged. [Citations.] The preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom. The use may be such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the owner. There seems to be no apparent reason for discussing the matter from the standpoint of presumptions. For the trial court the question is whether the circumstances proven do or do not justify an inference showing the required elements. In the appellate court the issue is merely whether there is sufficient evidence to support the judgment of the trial court. This view has been implicitly followed. [Citations.] In *Conaway v. Toogood* [172 Cal. 706], the rule is succinctly stated: 'The question as to whether or not the use of a right of way has been adverse and under a claim of legal right so to do, or a mere matter of neighborly accommodation, is a question of fact to be determined by the jury, or the court sitting without a jury, from all the facts and circumstances of the case.' [Citation.] While many of the cases mention presumptions, the problem actually discussed therein is the sufficiency of the evidence in the light of all the circumstances disclosed. Furthermore, we see no reason why the same rule should not apply to uncultivated and unenclosed land. It may require more circumstances to establish the right, but the test is ultimately the same." (*O'Banion v. Borba* (1948) 32 Cal.2d 145, 148-150.)

Contrary to the Wedbushes' contention on appeal, in this case the fact the trial court found Pacific Bell's use gave rise to a presumption of hostile use rather than an inference is not material. The problem with the Wedbushes' argument is that they overlook the limited nature of the "claim of right" element of a prescriptive easement. As the cases make clear, this element merely requires that a claimant of prescriptive rights show that it did not have the landowners' permission. (See *Felgenhauer v. Soni, supra,* 121 Cal.App.4th at p. 450.) Here the record compels a finding that Pacific Bell did not have either the Wedbushes' permission or the permission of any of their predecessors in interest. We note the Wedbushes themselves provided evidence that none of the owners had actual notice of Pacific Bell's use of the easement. In demonstrating the landowners did not have subjective knowledge of the easement, the Wedbushes went a long way in establishing that Pacific Bell did not have the landowners' permission. The inference Pacific Bell was not acting with the owners' permission is reinforced by the nature of Pacific Bell's use of the easement. Pacific Bell did not intermittently use the Wedbushes's land over a period of time. Pacific Bell installed permanent structures on the land and maintained and improved them for more than 50 years. The substantial investment Pacific Bell made in installing its lines and maintaining them strongly suggests that it was acting on its belief it had the right to use the land as opposed to more than the mere permission of the landowner which could be withdrawn at anytime.

In short, even if, as the Wedbushes' contend, Pacific Bell's long use only gave rise to an inference it was acting under a claim of right rather than a presumption, given the entire record we have no doubt the trial court could have and would have nonetheless

found Pacific Bell did not have the landowners' permission to install its lines. Thus the trial court's use of the presumption would not require we disturb the judgment.

B

The Wedbushes also contend that as bona fide purchasers for value they purchased both parcels free of any unrecorded encumbrances, including Pacific Bell's prescriptive easement. The cases and authorities which have considered the question have uniformly rejected the notion that prescriptive easements are subject to the recording statutes. (See *Jones v. Harmon* (1959) 175 Cal.App.2d 869, 878; *Klein v. Caswell* (1948) 88 Cal.App.2d 774, 778-779; *Myers v. Berven* (1913) 166 Cal. 484, 489; *Bockstiegel v. Board of County Com'rs of Lake County*, (2004 Colo.App.) 97 P.3d 324, 331; 3 Tiffany, Real Property, 399 § 828, and Ferrier, *The Recording Acts and Titles By Adverse Possession And Prescription* 14 Cal.L.Rev 287, 291-292; Burby, Real Property, 124-125 § 88.) "It is hornbook law that an easement or profit created by prescription is not within the scope of the recording statutes." (*Jones v. Harmon, supra*, 175 Cal.App.2d at 878.) We note that because prescriptive easements must be open and notorious, they provide constructive notice of their existence and thereby deprive purchasers of their status as bona fide purchasers without notice. (Compare *Mesmer v. Uharriet* (1916) 174 Cal. 110, 116-117 [purchaser had no notice of easement of necessity which was not observable by way of physical inspection].)

IV

Expansion of the Easement

In dismissing the Wedbushes' claims against SDG&E, the trial court stated: "While SDG&E permitted Pacfic Bell to attach its facilities to SDG&E's poles, it did not grant Pacific Bell any right to be on plaintiffs' property. Rather, SDG&E relied on Pacific Bell to obtain its own property rights to enter onto the Property. The Court finds that there was no duty on the part of SDG&E to independently determine whether Pacific Bell had obtained an easement or other right to be on the Property prior to attaching its facilities to SDG&E's poles. The evidence established that SDG&E has more than 40,000 poles. It would be unreasonable to require SDG&E to determine whether an attaching utility has obtained its own underlying property rights every time it allows a utility to attach to SDG&E's poles."

The trial court's factual findings are fully supported by the record and in particular by the terms of the Joint Pole Agreement, under which SDG&E did not purport to grant Pacific Bell any right to use the Wedbushes' land but instead required Pacific Bell to obtain that right from the Wedbushes or their predecessors in interest. Thus had any of the landowners brought a trespass action against Pacific Bell before the five-year prescriptive period (Code Civ. Proc., § 318; Civ. Code, § 1007) had run, the permission SDG&E provided to Pacific Bell under the Joint Pole Agreement would not have provided any defense to Pacific Bell. In light of the fact SDG&E did not in fact expand its own easement or prevent the landowners from asserting their rights against Pacific Bell, the trial court correctly concluded SDG&E did not improperly exceed the limits of

its own easement. Thus the Wedbushes' claims against SDG&E were properly dismissed.

DISPOSITION

The judgment in favor of Pacific Bell is reversed and the case is remanded for further proceedings consistent with the views we have expressed. The judgment in favor of SDG& E is affirmed.

The Wedbushes to recover their costs of appeal from Pacific Bell; SDG& E to recover their costs of appeal from the Wedbushes.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

O'ROURKE, J.